

ADR Case Screening



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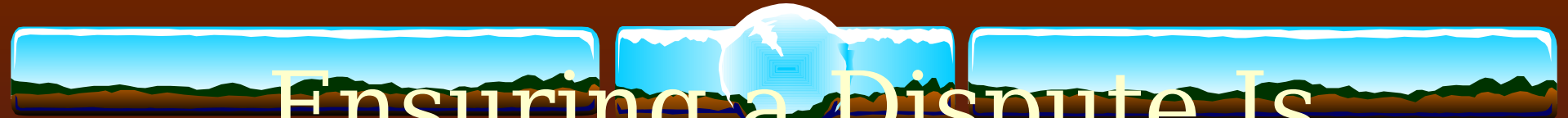
- ❖ Ensure dispute is amenable to ADR
- ❖ Determine when to offer ADR
- ❖ Ensure parties make an informed choice to use ADR to resolve their dispute
- ❖ The importance of the ADR agreement



Who Is Responsible for Case Screening?

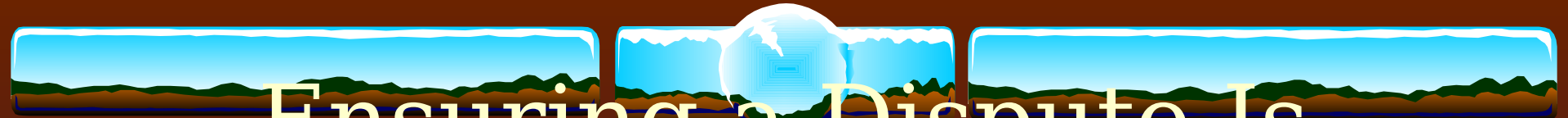
- ❖ Workplace disputes.
 - ❖ Case intake official.
 - ❖ EEO counselor, employee relations specialist, JA.*
- ❖ Contract disputes.
 - ❖ Contract Controversies (Pre-Appeal)
 - ❖ Appeals to the Armed Services Board of Contract Appeals
 - ❖ Appeals to the United States Court of Federal Claims

**Someone trained in ADR and knowledgeable about the mediation program at your base.*



Ensuring a Dispute Is Amenable to ADR: Where is the Guidance?

- ❖ Administrative Disputes Generally:
 - ❖ Administrative Dispute Resolution Act of 1996 (Codified at 5 U.S.C. §571, *et seq.*)
 - ❖ Precedent needed? (§572(b)(1))
 - ❖ Important policy involved? (§572(b)(2))
 - ❖ Maintaining uniform policy important? (§572(b)(3))
 - ❖ Outcome would affect non-parties? (§572(b)(4))
 - ❖ Public record important? (§572(b)(5))
 - ❖ Maintaining jurisdiction important? (§572(b)(6))



Ensuring a Dispute Is Amenable to ADR: Where is the Guidance?

- ❖ Federal Civil Litigation Generally:
 - ❖ DoJ Published Civil Litigation Case Screening Criteria See 61 Fed.Reg. 36,895-36,913 (July 15, 1996)
 - ❖ Case screening criteria vary depending on the nature of the case



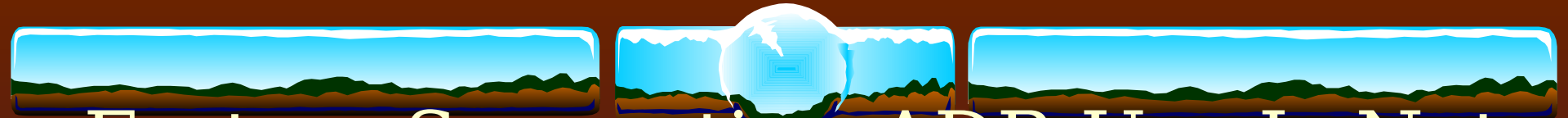
Ensuring a Dispute Is Amenable to ADR: Where is the Guidance?

- ❖ One Thing Common to All Case Screening:
 - ❖ **Allegations of fraud, waste or abuse are normally an ADR showstopper!**
 - ❖ While some cases have proceeded to use ADR -- they had to be ***carefully*** coordinated.
 - ❖ Allegations of fraud can lead to otherwise confidential information being released to Grand Juries, etc.



Factors Suggesting the Use of ADR May Be Helpful

- ❖ Parties are interested in seeking settlement, but personality conflicts or poor communication are obstacles.
- ❖ Underlying issues - not formally part of the claim/complaint- serving as the catalyst for the claim/complaint.
- ❖ Flexibility is desired in shaping the relief.
- ❖ A continuing relationship between the parties is desirable.
- ❖ Parties' views of the case are unrealistic. (Reality testing).
- ❖ Parties expect to settle eventually, most likely on the steps of the "hearing room" or courthouse.
- ❖ A need to avoid adverse precedent, but traditional settlement negotiations have reached an impasse.

The header features three landscape panels with green hills and blue skies, separated by a central globe.

Factors Suggesting ADR Use Is Not Appropriate or May Not Be Productive

- ❖ Indication that fraud, waste or abuse was committed by either party.
- ❖ Case involves significant legal, policy or constitutional issues and one of the parties desires a precedent.
- ❖ Dispute significantly affects non-parties.
- ❖ Need for uniform treatment toward an issue or disputant.
- ❖ Case is likely to settle through unassisted negotiations.
- ❖ Full public record is needed.

A decorative header at the top of the slide featuring a central globe flanked by two rectangular panels, each showing a stylized landscape with green hills and a blue sky.

Ensuring a Dispute Is Amenable to ADR: Do Checklists Work?

- ❖ Some believe that checklists of factors favoring and not favoring the use of ADR permit attorneys to do what they do best -- a balancing test analysis
- ❖ Other believe that less is more and have developed what they believe are more streamlined methodologies for ADR case screening analysis

A decorative header featuring a stylized landscape with green hills and a blue sky. In the center, a white globe is partially obscured by a blue rectangular frame. The background of the slide is a solid dark blue.

Ensuring a K Dispute Is Amenable to ADR: The AF ADR Reference Book (<http://www.adr.af.mil/acquisition/index.htm> 1)

- ❖ What are our business objectives?
- ❖ Why did negotiations reach impasse?
- ❖ Are there any pragmatic/legal reasons why ADR would not work?



When Should ADR Be Offered?

- ❖ As soon as practicable so that the AF resolves disputes at the lowest level possible.
- ❖ **Contract disputes.**
 - ❖ Any time during the dispute process.
- ❖ **EEO complaints.**
 - ❖ Any time during the life-cycle of the complaint.
- ❖ **Agency grievances.**
 - ❖ Any time until a final agency decision is made.
- ❖ **Negotiated grievances.**
 - ❖ Consult the CBA and/or the LRO.



Key to Good Case Screening

- ❖ Ensuring the parties make an informed choice about agreeing to use ADR to resolve their dispute.
- ❖ Inadequate knowledge will:
 - ❖ Greatly hinder the credibility of the ADR process;
 - ❖ Diminish the chances for the process to resolve a dispute; and--
 - ❖ Limit the neutral's ability to help the parties.



The ADR Agreement

- ❖ Once the parties sign an ADR agreement, the vast majority (75-97% of disputes) are resolved
- ❖ Workplace dispute ADR agreements ensure the parties understand the process, time, place and rules of engagement
- ❖ Contract dispute ADR agreements tend to be more complicated



Summary

- ❖ Where to go to get basic guidance on when disputes are amenable to ADR
- ❖ Guidance on when to offer ADR
- ❖ Ensure the parties make an informed decision to use ADR